78-223

No.

Supreme Court, U. S.
FILED
AUG 8 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

DAVID F. ZORENSKY,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet officially reported. The decision and order of the National Labor Relations Board (App. C, *infra*) are reported at 223 NLRB 344.

JURISDICTION

The judgment and order of the court of appeals (App. B, *infra*) was entered on May 10, 1978. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that a hospital violated Section 8(a)(1) of the National Labor Relations Act by issuing and maintaining a rule that prohibits employees during nonworking time from soliciting union support in all areas of the hospital to which patients and visitors have access.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. (and Supp. V) 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * * *

STATEMENT

Baptist Hospital, Inc., is a nonprofit health care institution located in Nashville, Tennessee (App. C, *infra*, 30a).[1] In August 1974, the Union (Local 150-T, Service Employees International Union, AFL-CIO) began a campaign to organize the Hospital's employees, and in October the Hospital revised its existing no-solicitation/no-distribution rules (App. C, *infra*, 33a). As revised, they provided in relevant part (App. C, *infra*, 34a):

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time including work time and non-work time, in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.

---

[1] The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage to nonprofit health care institutions. 88 Stat. 395.

> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time.

The effect of these rules was to prohibit all solicitation by employees in any area open to the public or in any area where work was performed. Included in the areas on the premises closed to solicitation were a gift shop and the hospital cafeteria, an eating facility used by employees, visitors, and a small percentage of patients, with the permission of their physicians.[2] (App. C, *infra*, 35a.) Solicitation was permitted in employee lounges and vending machine areas, utility rooms, nurses' stations and those rest rooms that are restricted to employees (App. C, *infra*, 36a).[3]

Upon charges filed by the Union, the Board concluded that the Hospital's no-solicitation rule violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), to the extent that it "prohibits employees from soliciting for the Union during their nonwork time in areas of the hospital other than immediate patient care areas"

[2] While there are other non-working areas of the Hospital where employees may purchase food from vending machines, the cafeteria is the only place in the Hospital where hot food may be purchased by employees and others (App. C, *infra*, 36a).

[3] There is an employee lounge in the laundry building of the Hospital, and another lounge on the surgery floor of the Hospital which can hold only 25 to 30 employees (App. C, *infra*, 36a-37a). The Hospital has more than 1800 employees (App. A, *infra*, 2a).

(App. C, *infra*, 22a).[4] In so doing, the Board followed its decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150. It was there held that, while a hospital may lawfully ban employee solicitation, even during nonworking time, in immediate patient care areas such as the patients' rooms, operating rooms, and places where patients receive treatment, a ban on that activity in other areas to which patients and visitors have access is invalid, absent a showing by the hospital that such a ban is necessary to avoid disruption of patient care (*ibid.*). Accordingly, in the present case, the Board ordered the Hospital to rescind its revised no-solicitation rule and to cease and desist from promulgating, maintaining, enforcing, or applying any rule "prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of [the Hospital] other than immediate patient care areas" (App. C, *infra*, 22a, 90a).

The court of appeals denied enforcement of the Board's order. The court found that the testimony of two physicians and a hospital administrator as to the necessity of creating and maintaining a tranquil atmosphere throughout the Hospital was sufficient to establish "special circumstances" that warranted the Hospital's proscription of employee solicitation in all areas accessible to patients and visitors, including the Hospital's cafeteria (App. A, *infra*, 7a-8a). Rejecting

[4] The General Counsel took no issue with the Hospital's prohibition against employee distribution of literature in any working area at any time (App. C, *infra*, 63a).

the Board's *St. John's* policy, the court agreed with the Tenth Circuit [5] and the District of Columbia Circuit [6] that the Board had failed to give sufficient weight to the special needs of hospital patients and that the Board's balancing of the interests involved was unreasonable and contrary to the intent of Congress in enacting the 1974 health care amendments to the Act (App. A, *infra*, 8a-9a).

REAONS FOR GRANTING THE WRIT

In *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152, decided June 22, 1978, this Court held that the Board's policy as enunciated in *St. John's*, *supra*,—"which requires that absent * * * a showing [of a substantial threat of harm to patients] solicitation and distribution be permitted in the hospital except in areas where patient care is likely to be disrupted"—was a permissible "construction of the Act's policies as applied to the health-care industry by the 1974 amendments" (slip op. 15). The Court further held that the Board had reasonably applied that policy in concluding that the hospital in *Beth Israel* had violated the Act by barring solicitation and literature distribution in the hospital cafe-

[5] See *St. John's Hospital and School of Nursing, Inc.* v. *National Labor Relations Board*, 557 F. 2d 1368.

[6] See *Baylor University Medical Center* v. *National Labor Relations Board*, No. 76-1940, decided February 14, 1978, 97 LRRM 2669, petition for certiorari filed July 13, 1978, No. 78-80.

teria, which was used primarily by employees but also by patients and visitors (slip op. 17-22).

The decision of the court below that the Hospital was justified in proscribing employee solicitation in the cafeteria and all other patient-access areas is inconsistent with the holding in *Beth Israel* and with this Court's general approval of the Board's *St. John's* policy followed here. In these circumstances, the judgment of the court below should be vacated and the case should be remanded for reconsideration in light of this Court's decision in *Beth Israel*.

Moreover, since the Court in *Beth Israel*, while generally approving the Board's *St. John's* policy, emphasized that the Board should apply that policy in each hospital case with due regard for "the importance of the employer's interest in protecting patients from disturbance" (slip. op. 20),[7] it is appropriate that this reconsideration be performed by the Board in the first instance. Cf. *Lutheran Hospital* v. *National Labor Relations Board*, No. 77-1289, order entered June 26, 1978, vacating judgment enforcing

[7] The Court explained (slip op. 20-21):

> While outside of the health care context, the availability of alternative means of communications is not, with respect to employee organizational activity, a necessary inquiry, * * * it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility. * * *

a Board order similar to the one at issue here, and remanding case to the court of appeals for reconsideration in the light of *Beth Israel.*[a]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court with directions to remand it to the Board for reconsideration in the light of *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152, decided June 22, 1978.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

DAVID F. ZORENSKY,
Attorney,
National Labor Relations Board.

AUGUST 1978.

---

[a] The Board intends to request the Seventh Circuit to remand *Lutheran Hospital* to it so that it can perform the reconsideration task initially in that case also.

APPENDIX A

No. 76-1675

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC., RESPONDENT

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided and Filed May 10, 1978

Before: PHILLIPS, Chief Judge; LIVELY and ENGEL, Circuit Judges.

LIVELY, *Circuit Judge.* This case concerns the validity of a "no-solicitation rule" in a hospital setting. Following a hearing an administrative law judge concluded that the rule is invalid on its face to the extent that it prohibits solicitations at any time in all areas of the hospital which are accessible to, or utilized by the public. He also held that no unusual circumstances had been established which would justify

the otherwise invalid restrictions contained in the rule. The National Labor Relations Board (the Board) considered exceptions filed by Baptist Hospital, Inc. (the hospital) and agreed with the conclusion of the administrative law judge that promulgation and enforcement of the no-solicitation rule constituted a violation of provisions of the National Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§ 141, *et seq.* (the Act). The Board's decision and order are reported at 223 NLRB No. 34 (1976).

Baptist Hospital, located in Nashville, Tennessee, is a nonprofit general hospital with 600 beds and more than 1800 employees. For some years prior to 1974 the hospital had enforced a rule against solicitations which applied to the entire hospital premises. In August 1974 a union began attempts to organize employees of the hospital. Also, during that month the Act was amended to give the Board jurisdiction over nonprofit health care institutions.

W. T. Victory, vice president of personnel services for the hospital, testified that the no-solicitation rule was revised with the advice of counsel. The present rule, effective since October 4, 1974, reads as follows:

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the

> Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time.

In publishing the revised rule the hospital explained its purpose in an employee's handbook as being "to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital."

The same witness testified that, as applied by the hospital, the rule prohibits all soliciting and the distribution of literature by employees in any area open to the public or any area where work is performed. Included in the areas closed to solicitation are a gift shop and cafeteria which are open to employees, visitors to the hospital, and with some exceptions, to patients. Solicitation and distribution are permitted, however, in several employees' lounges which contain vending machines, 28 utility rooms, 26 nurses' stations and those rest rooms which are restricted to employees. There was uncontradicted testimony that employees have openly solicited for a union in some

of these areas without interference. Vice-president Victory also testified that there was no change in application of the hospital's longstanding rule against solicitations after October 4, 1974; that the revisions were made in order to be in compliance with the law. He conceded that union activity was "involved" in adoption of the revised rule.

The witness Victory related that when the union commenced its activities some employees were stopped for discussion of the pros and cons of organizing and this caused a disruption of the work force at various places throughout the hospital. The revised rule was required, the witness stated, to prevent disruption of patient care. It would not be in the best interest of the patients to change the rule, in the opinion of Victory, who stated that this was also the consensus of doctors with whom he had discussed the possibility of changing the rule.

Two members of the medical staff of the hospital testified. Both were experienced physicians engaged in private practice. Dr. Russell T. Birmingham testified that it was important to shield patients from emotional problems because the attitude of a patient and the patient's family have "a great deal to do with the recovery" of the patient. The witness stated that the need to maintain a tranquil atmosphere is not limited to treatment areas, since patients are permitted to move around in all areas of the hospital. If union activity should become "volatile or hostile in any form" it was Dr. Birmingham's opinion that

such activity would have a potential for affecting patients and their families adversely.

Dr. Greer Ricketson testified that any "nonprofessional attitude" among hospital employees is upsetting to patients. He stated that patients and their families are disturbed when people who are supposed to be taking care of them seem to have their minds on other things. This witness, who was chief of the medical staff of the hospital at the time of the hearing, stated emphatically that the rule and the reasons for the rule apply equally to all solicitations. Explaining the need for a rule which covers the entire working and public-access areas of the hospital, Dr. Ricketson referred to the present-day mobility of patients and the fact that an event which disturbs the visiting family invariably gets back to the patient.

No evidence was introduced which contradicted in any way the testimony of the two doctors that important medical reasons exist for maintaining the no-solicitation rule of the hospital. The administrative law judge summarized their testimony and found nothing "new or unusual" in it. He concluded that the hospital had failed to establish the existence of unusual circumstances at Baptist Hospital sufficient to warrant approval of a rule which prohibits solicitation in nonworking areas on nonworking time. The Board agreed with this conclusion without discussion, merely holding:

> By promulgating and maintaining a no-solicitation rule which prohibits employees from soliciting for the Union during their nonwork time in

areas of the hospital other than immediate patient care areas, Respondent has violated Section 8(a)(1) of the Act.[1]

Both the decision of the Board and that of the administrative law judge are weakened by their reliance on previous Board orders which have been denied enforcement upon judicial review. The administrative law judge relied almost exclusively on *Summit Nursing Home, Inc.*, 196 NLRB No. 110 (1972), in holding the no-solicitation rule in the present case invalid. This court denied enforcement of the Board's order in its entirety in *N.L.R.B.* v. *Summit Nursing Convalescent Home*, 472 F.2d 1380

[1] Section 8(a)(1), codified as 29 U.S.C. § 158(a)(1), reads:

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Section 157, referred to above, the codification of section 7 of the Act, provides:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

(1973). In affirming the decision of the administrative law judge in the present case the Board based its holding squarely on its decision in *St. John's Hospital & School of Nursing*, 222 NLRB No. 182 (1976). The portion of the decision and order thus relied upon was denied enforcement by the court of appeals. *St. John's Hospital and School of Nursing, Inc.* v. *N.L.R.B.*, 557 F.2d 1368 (10th Cir. 1977).

In ordering that the ban against solicitation by non-working employees in the present case be limited to areas of "immediate patient care" the Board in effect held that the hospital had proven "special circumstances" only in relation to those areas. The proof is otherwise. Three witnesses emphasized the fact that many patients, though hospitalized for serious illnesses, are permitted to move freely through public areas of the hospital. Ambulatory patients are permitted to visit with their families and friends in the lobbies and public lounges. They are free to visit the gift shop and, with a doctor's permission, to eat in the public cafeteria. These witnesses, two physicians and an experienced hospital administrator, repeatedly referred to the necessity of creating and maintaining a tranquil atmosphere throughout the hospital for patients and visitors. The testimony of the medical witnesses related this requirement directly to the well-being of the patients. The witnesses made no distinction between areas of immediate patient care and other areas of the hospital. Dr. Ricketson stated that patient care is the only purpose

of the hospital, and anything which interferes with patient care should be forbidden.

Recent Board orders limiting a hospital's right to ban solicitation and distribution to "immediate patient care areas" have been enforced. See *Lutheran Hospital of Milwaukee, Inc.* v. *N.L.R.B.*, 564 F.2d 208 (7th Cir. 1977); *N.L.R.B.* v. *Beth Israel Hospital*, 554 F.2d 477 (1st Cir. 1977), *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3446 (Jan. 17, 1978). We are urged to follow those decisions, but decline to do so. In the setting of a modern general hospital it is difficult to define the areas of immediate patient care. One of the medical witnesses in the present case referred to the importance of the "psychological attitudes" of patients. A patient's attitude toward the hospital and the likelihood of receiving expert care while there depends in part on whether he perceives the staff as concerned exclusively with patient care. This need for professionalism was not limited by the witness to doctors and nurses, but was set forth as a requirement for all employees. Both physician witnesses testified that any activity within the hospital involving volatile or hostile discussion of any subject, whether observed by patients or related to them by visiting family or friends, would be detrimental to their well-being. There is no evidence in this case to justify an "immediate patient care" area limitation on the no-solicitation rule.

We are persuaded that the reasoning of the courts in *St. John's Hospital, supra*, and *Baylor Medical Center* v. *N.L.R.B.*, —— F.2d —— (D.C. Cir. No. 76-1940, Feb. 14, 1978), is correct. In *St. John's* the no-solicitation rule was enforced in all areas of the hospital, including a cafeteria and gift shops to which patients had access. The court there concluded that the Board had failed to give sufficient weight to the special needs of hospital patients and that the Board's balancing of the interests involved was unreasonable. Congressional concern for the special circumstances of hospitals as shown by the legislative history of the 1974 amendments to the Act was noted in both the *St. John's* and *Baylor University* opinions. Both courts related this concern to the necessity of avoiding disruptions in the continuity of patient care. The D.C. Circuit specifically found that this concern was not limited to prevention of disruptions which would be caused by strikes and picketing.

The Board urges, apart from application of the present rule to lobbies, corridors and visitors' lounges, that no ban on solicitation or distribution in the public cafeteria and gift shop is permissible. It is argued that these locations are not involved in the "main function" of the hospital and should be available to nonworking employees for organizational activities. The Board asserts that the commercial and financial justifications which have led it to uphold prohibitions on solicitations in restaurants and retail stores do not apply to a hospital setting. See, *e.g.*, *Marshall Field & Co.* v. *N.L.R.B.*, 200 F.2d 375 (7th Cir. 1952, *amended* 1953); *N.L.R.B.* v. *May Department Store, Inc*, 154 F.2d 533 (8th Cir.), *cert.*

denied, 329 U.S. 725 (1946); *McDonald's of Palolo*, 205 NLRB No. 78 (1973). This same argument was made by the Board and rejected by the court in *St. John's* and by a majority of the panel in *Baylor University, supra.* The Board's position was adopted in *N.L.R.B.* v. *Beth Israel Hospital, supra.* There the court held that the hospital failed to sustain its burden of showing that special circumstances justified a ban on solicitations in cafeteria and coffee shop. However, we conclude that the hospital did carry its burden in the present case. Here the record contains uncontradicted testimony that these areas are part of the total environment of the hospital where the medical needs of patients are served by maintaining a climate free of strife and controversy. We decline to follow *Beth Israel.*

As has been pointed out Baptist Hospital has a large number of areas which are closed to patients and the public where the no-solicitation rule does not apply. This fact alone would not validate an otherwise unlawful no-solicitation rule. However, since we conclude that the hospital did carry its burden of establishing special circumstances, the existence of numerous locations which are open to solicitation further convinces us that the hospital's rule does not deny its employees those rights secured to them by section 7 of the Act.

Both medical witnesses stated that person-to-person solicitation and distribution of literature in the parking lot should have no detrimental effect on patients within the hospital. Vice-President Victory agreed

that solicitation and distribution in the parking lot would not be objectionable so long as the premises were not littered and solicitation did not "create a nuisance." Other rules not in issue here provide the means for preventing noisy mass meetings and littering of the premises. Accordingly, in denying enforcement of the Board's order we construe the hospital's no-solicitation, no-distribution rule to apply only to areas within the various buildings occupied by the hospital and those exterior areas immediately adjacent to entrances used by patients and the public.

The administrative law judge made findings that the hospital had discriminated against one employee for his union activities. Most of his activities were prohibited by the rule which we have found to be valid. However, there is some evidence to support inferences of discrimination against this employee for protected activities unrelated to the no-solicitation rule. Nevertheless, the broad language of the Board's order with respect to "interfering with, restraining or coercing its employees in the exercise of their rights" to be represented by a union is not justified. Enforcement of the order of the Board is denied in its entirety except insofar as it relates to Clyde Russel French, an employee. The order relating to French is incapable of enforcement without modification.

The court was advised at oral argument that Clyde Russell French has died, abating that portion of the order which directs the hospital to offer him employment. The "make whole" provisions of the order appear to rest largely upon the determination of the

administrative law judge and the Board that the hospital's no-solicitation rule is invalid. To the extent that these provisions rest on that assumption, they will not be enforced. We remand to the Board for a specification of what remedial provisions, if any, of its previous order are unrelated to the hospital's no-solicitation rule.

APPENDIX B

No. 76-1675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 10, 1978]

[26-CA-53331-1]

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC., RESPONDENT

ORDER

Before: PHILLIPS, Chief Judge, LIVELY and ENGEL, Circuit Judges.

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the record of proceedings before the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that enforcement of the order of the Board is denied in its entirety except insofar as it relates to Clyde Russell French, and the case is remanded to the National Labor Relations Board for a specification of what remedial provisions, if any, of its previous order are unrelated to the hospital's no-solicitation rule.

No costs taxed.

Entered by order of the Court

/s/ John P. Hehman
Clerk

A TRUE COPY
Attest:

JOHN P. HEHMAN
Clerk

By /s/ Dorothy J. Phula
Deputy Clerk

Issued as Mandate: May 31, 1978
COSTS: None

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 26-CA-5331-1 and
26-CA-5331-2

BAPTIST HOSPITAL, INC.

and

LOCAL 150-T, SERVICE EMPLOYEES

INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On August 26, 1975, Administrative Law Judge Morton D. Friedman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. An *amicus curiae* brief was filed by the Tennessee Hospital Association, Inc.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law

conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We agree with the findings of the Administrative Law Judge except his finding that Respondent did not violate Section 8(a)(1) of the Act by ejecting Clyde French from its cafeteria.[2] In addition, we find that Respondent violated Section 8(a)(3) and (1) by reducing the number of days French has worked since September 16, 1974.[3]

Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

We hereby correct certain inadvertent errors made by the Administrative Law Judge: (1) The Administrative Law Judge at sec. III, C, 3, par. 4, found that two full-time nursing assistants were hired on the second shift between October 10, 1974, and the middle of November, whereas at sec. III, B, 2, par. 24, he correctly found that they were assigned to the third shift; (2) the Administrative Law Judge at sec. III, B, 2, par. 7, found that French had been assigned to work on September 27, 1974, whereas the record shows that he was assigned to work on September 28.

[2] While we agree with the Administrative Law Judge's finding that Respondent's no-solicitation rule violated Section 8(a)(1), we do so for the reasons fully set forth in our opinion in *St. John's Hospital & School of Nursing*, 222 NLRB No. 182 (1976).

[3] The Administrative Law Judge found that in light of his finding that Respondent violated Sec. 8(a)(3) and (1) by failing to offer full-time work to French it was unnecessary to decide this issue.

With respect to the latter finding, it is clear that Respondent has discriminated against French by reducing his days of work as a PRN employee after September 16, 1974. The record shows that prior to French's activities on behalf of the Service Employees International Union beginning in September 1974 he was regularly assigned work. Between February 17 and May 12, 1974, French worked on weekends as a PRN employee during the second or 3-11 p.m. shift. In that 13-week period, he worked an average of almost 3 days each week.[4] At his request, he was subsequently assigned to full-time duty on the second shift from May 13 until September 15. During that 18-week period, he worked an average of 5 days each week.

In the first 3 weeks of September, French distributed handbills and solicited employees to sign union authorization cards. This activity was carried out on his break periods and before or after work in locations such as the hospital cafeteria, the snackbars, the lockerrooms, and on the sidewalks outside the building. It is undisputed that Respondent was fully aware of this activity. Moreover, French testified that when he told Supervisor Lightford on September 16 that he was not worried about Respondent's knowledge of his union activities Lightford said, "We will see about that."

---

[4] However, Respondent states that PRN employees are not guaranteed a set number of workdays each week. They are used by the hospital to fill in for absent or vacationing employees or on the basis of patient care requirements.

On September 2, French's request to return to PRN status beginning September 16 was approved. Thereafter, on September 19, Supervisor Lightford scheduled him for second-shift work on September 21, 22, 28, and 29. On September 17, French also requested first-shift work on September 21 and 22. When he repeated his request on September 19, he was told by Lightford that his assigned work for September 21 and 22 had been canceled. On September 20, French received a letter from Respondent postmarked September 16. The letter informed him that not only had the September 21 and 22 assignments been canceled but that he was no longer scheduled to work on September 28 and 29. According to French's credited testimony, this was the first time in his almost 3 years of employment with Respondent that his scheduled work had been canceled.

On September 22, French visited the hospital and asked Lightford if he needed any extra help that day. Lightford told him that he did and referred him to Assistant Director Hamilton. She assigned him to work on the second shift that day and also scheduled him to work on September 27 and 29.

During his break on the evening of September 22, French solicited employees in the hospital cafeteria. Thereafter, on September 26, after soliciting employees and distributing union literature on the sidewalk outside the hospital, French examined the nursing assignment book and discovered that his scheduled work for September 27 and 29 had been canceled. When he entered Assistant Director Hamilton's office, he received a written reprimand which stated that he had violated Respondent's rules by overstaying his break on September 22 and interfering with the work of on-duty employees. He asked her why his scheduled work had been canceled. She told him, "The hospital didn't need employees like me who violated their rules."

Between September 16, 1974, and the date of the hearing in April 1975, French received offers from Respondent for only about 11 days of work. Although he requested PRN work on the second shift only, after September 22 he was given no work assignments on that shift. In spite of his request for weekend work, the few offers which he received were from Monday through Friday. In this regard, French testified that Supervisor Lightford told him on October 13 that he had been instructed not to work French on weekends but only on weekdays when the administrators were around.

We find that since September 16, 1974, Respondent has discriminated against French by reducing the number of his work assignments. In support of this finding we rely on: (1) the substantial decrease in the days of work offered to French since he commenced his union activities; (2) Respondent's sudden and unprecedented cancellation of French's scheduled work assignments; (3) contrary to past practice, Respondent refused to honor French's preference for second-shift work on weekends; (4) evidence that, contrary to Respondent's claim that it was economizing by decreasing the use of PRN em-

ployees after September 22, between that date and the date of the hearing employees have consistently worked overtime on the second shift, including September 21, 27, and 29 when French had originally been scheduled to work; and (5) testimony by French that, when he went into the nursing services office in November to routinely check the assignment book, Mrs. Mathis told him, "I don't think they want you looking at it." Accordingly, we find that Respondent has thereby violated Section 8(a)(3) and (1).[5]

We also find that Respondent violated Section 8(a)(1) by ejecting French from its cafeteria. Around 6 p.m. on January 30, 1975, French went to the hospital to pick up his paycheck and stopped by the cafeteria to see some friends. After a few minutes he spotted Charge Nurse Edens sitting in the cafeteria, but as he walked to her table Assistant Vice President Hampton stopped him. French testified that Hampton told him, "French you know what I told you the last time you were here."[6] Hampton then asked him to leave the cafeteria. When French

[5] The Administrative Law Judge provided for, *inter alia*, a make-whole remedy for French with respect to Respondent's failure to assign him full-time work. The remedy is effective from October 10, 1975, the date when French requested full-time status. Since the time periods covered by that unfair labor practice and the instant unfair labor practice overlap after October 10, our remedy for Respondent's withholding of PRN work from French will cover the period between September 16 and October 10.

[6] Hampton was referring to his role in terminating a conversation between French and two other employees on the evening of December 26, 1974.

inquired, "Isn't this open to the public?" Hampton answered, "Not for you it isn't, French." French refused to leave and proceeded to Charge Nurse Edens' table. A few minutes later, two security guards asked him to leave, whereupon he was escorted out of the building.

The Administrative Law Judge found that Respondent's ejection of French constituted lawful enforcement of its rule that "Employees are not permitted to receive visitors while on hospital duty." We disagree. According to French's testimony, prior to his activities on behalf of the Union, he had on a number of occasions similarly visited other employees. He had never been reprimanded. We have taken into account this testimony, as well as his testimony that Hampton told him that the hospital's public cafeteria was open to everyone but him. We find that Respondent's ejection of French from its cafeteria was an expression of its antipathy towards him because of his union activities. Such conduct is violative of Section 8(a)(1) of the Act.

The Remedy

We have found in agreement with the Administrative Law Judge that the Respondent engaged in conduct violative of Section 8(a)(1) and of Section 8(a)(3) and (1) and, accordingly, we adopt his remedial recommendations in that regard. However, we have found, contrary to the Administrative Law Judge, that the Respondent has engaged in an addi-

tional unfair labor practice in violation of Section 8(a)(1) of the Act. We therefore order that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In addition, we have found that Respondent has withheld PRN work from Clyde French in violation of Section 8(a)(3) and (1) of the Act. We shall order that he be made whole for any loss of pay or other benefits sustained as the result of the Respondent's withholding of work from him between September 16 and October 10, 1974, computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the basis of the foregoing findings of fact and upon the record as a whole, we make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 150-T, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating and maintaining a no-solicitation rule which prohibits employees from soliciting for the Union during their nonwork time in areas of the hospital other than immediate patient care areas, Respondent has violated Section 8(a)(1) of the Act.

4. By discriminatorily reprimanding employee Clyde Russell French on October 26, 1974, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By discriminatorily refusing full-time work assignments to employee French on and after October 10, 1974, the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

6. By discriminatorily withholding PRN work from employee French after September 16, 1974, the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

7. By ejecting French from its public cafeteria, the Respondent has violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Baptist Hospital, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(a) and substitute in lieu thereof the following:

"(a) Promulgating, maintaining in effect, enforcing, or applying an rule or regulation prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of its hospital other than immediate patient care areas."

2. Insert the following paragraphs after paragraph 1(b) and reletter subsequent paragraphs accordingly:

"(c) Withholding work from any of its employees for engaging in union or other protected concerted activities."

"(d) Ejecting any of its employees from the hospital's public cafeteria for engaging in union or other protected concerted activities."

3. Insert the following paragraph after paragraph 2(a) and reletter subsequent paragraphs accordingly:

"(b) Make Clyde Russell French whole for any loss of earnings he may have suffered between September 16 and October 10, 1974, by reason of the discrimination against him in the manner set forth in the section of this Decision entitled 'The Remedy.' "

4. Substitute the attached notice for the Administrative Law Judge's notice.

Dated, Washington, D.C.

BETTY SOUTHARD MURPHY, Chairman

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT promulgate, maintain in effect, enforce, or apply any rule or regulation prohibiting you from soliciting on behalf of any labor organization during your nonworking time in any area of the hospital other than immediate patient care areas.

WE HEREBY RESCIND the rule promulgated October 4, 1974, to the extent that it prohibits you from soliciting on behalf of a labor organization during your nonworking time in any area of the hospital other than immediate patient care areas.

WE WILL NOT issue reprimands or otherwise discipline you for engaging in union or protected concerted activities.

WE WILL NOT refuse employment to or withhold work from any of our employees because they engage in union or protected concerted activities.

WE WILL NOT eject employees from our public cafeteria because they engage in union or protected concerted activities.

WE WILL offer Clyde Russell French immediate employment as a full-time nurses assistant, or a substantially equivalent position at which position he would have been employed had he not been discriminated against, without prejudice to his seniority or

other rights and privileges he might have acquired, dismissing, if necessary, any persons hired on or after October 10, 1974.

WE WILL make whole Clyde Russell French for any loss of earnings or other benefits he may have suffered by our refusal to offer him full-time work and by our withholding of PRN work from him.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to form, join, or assist or be represented by Local 150-T, Service Employees International Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of your own choosing, or engage in other concerted or protected activity for the purpose of collective bargaining or any other mutual aid or protection or to refrain from any or all such activities.

All our employees are free to become or remain or refrain from becoming or remaining members of Local 150-T, Service Employees International Union, AFL-CIO, or any other labor organization.

BAPTIST HOSPITAL, INC.
(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, Clifford Davis Federal Building, Room 746, 167 North Main Street, Memphis, Tennessee 38103, Telephone 901—534-3161.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Cases 26-CA-5331-1
26-CA-5331-2

BAPTIST HOSPITAL, INC.

and

LOCAL 150-T, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

William H. Brown, Jr., Esq.,
of Memphis, Tenn., for the
General Counsel.

Joe H. Clark, Esq. (*Elarbee and Clark*), of Atlanta, Ga.,
for the Respondent.

DECISION

Statement of the Case

MORTON D. FRIEDMAN, Administrative Law Judge: Upon an original charge in Case 26-CA-5331 filed on October 11, 1974, and a first amended charge filed in Case 26-CA-5331-1 on December 2, 1974, an original charge in Case 26-CA-5331-2 filed October 15, 1974, and a first amended charge in Case 26-CA-5331-2 filed December 2, 1974, all filed by Local 150-T, Service Employees International Union, AFL-CIO, hereinafter called the Union, the Regional Director

for Region 26 of the National Labor Relations Board, herein called the Board, issued a complaint on December 4, 1974 [1] on behalf of the General Counsel of the Board against Baptist Hospital, Inc., herein called the Hospital or the Respondent alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151 *et seq.*), herein called the Act. In its duly filed answer to the complaint, the Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practices.

Pursuant to notice, the hearing in this case was held in Nashville, Tennessee on April 1 and 2, 1975. All parties were represented and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. Briefs were filed, by Counsel for the General Counsel and the Respondent. Upon consideration of the entire record, including the briefs of the parties, and upon my observation of each witness appearing before me, I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, a corporation doing business in the State of Tennessee, operates a nonprofit hospital providing health care services in Nashville, Tennessee. During the 12-month period immediately preceding

[1] This complaint was amended at the hearing as hereinafter set forth.

the issuance of the complaint herein, a representative period, the Respondent received gross revenue for services rendered to patients at the said Hospital in an amount in excess of $250,000.

It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Background and Issues*

In substance, the complaint, as amended at the hearing, alleges that the Respondent promulgated, maintained and enforced an over broad no-solicitation, no-distribution rule in violation of Section 8(a)(1) of the Act. The complaint further alleges that the Respondent discriminated against employee Clyde Russell French in violation of Section 8(a)(3) of the Act by restricting and reducing the number of hours French worked each week and issuing a written warning to French for engaging in protected concerted and union activities. Additionally the complaint alleges that the Respondent violated Section 8(a)(1) by attempting to deny French access to the Respondent's cafeteria and causing security guards to reject French.

The Respondent's answer, which denies the commission of any unfair labor practices, is supported by the Respondent's contentions that because of "unusual circumstances," the Respondent's Hospital being a health care institution, the aforesaid no-solicitation, no-distribution rule is reasonable and proper and not in violation of any section of the Act. Furthermore, Respondent contends that French's hours of work were not reduced because of French's union activities but rather because of economic conditions within the Hospital and the necessity to reduce operating costs as much as possible. Moreover, Respondent contends that all its other actions toward French were necessary and proper in order to safeguard the treatment of its patients and were merely carried out as part of its program of health care and were necessary to insure the same.

B. *The Facts*

1. The No-Solicitation, No-Distribution Rule

For some years before October 4, 1974, the Respondent maintained a no-solicitation rule at its Hospital which read as follows:

> In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval of the Administrator. Violation of this policy will subject employee to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their supervisor.

W. T. Victory, Respondent's vice-president of personnel services, testified that the foregoing no-solicitation rule was basically designed to keep salesmen out of the Hospital.

In approximately early August 1974, the Union commenced a campaign to organize the Respondent's hospital employees. Victory testified that he became aware of the union campaign at approximately mid-August 1974 when he observed representatives of the Union handbilling outside the Hospital.

Also, on August 27, 1974, the National Labor Relations Act, herein called the Act, was amended to give the Board jurisdiction over all health care institutions regardless of whether they were profit or nonprofit institutions.[2] Victory testified that enactment of this amendment to the Act necessitated a change in the foregoing no-solicitation clause because the Respondent's Hospital, which had hitherto been exempt from the assertion of jurisdiction by the Board, now became subject to the Board's jurisdiction and to the various provisions of the Act and the Board's interpretations of the Act.

Because the Respondent was concerned over the Union's organizational activities and the possible results thereof, and because of the change in the Act, which rendered the foregoing no-solicitation rule in-

---

[2] Public Law 93-360, 93rd Congress, S. 3203, August 27, 1974.

valid, the Respondent requested its counsel to study and survey its personnel policies. Respondent's counsel revised the no-solicitation rule so that it would meet both of the foregoing exigencies. The revised no-solicitation rule reads as follows:

> The solicitation and distribution policy of Baptist Hospital has been revised. This has been done to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital. The policy is as follows:
>
> "No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time."

As admitted by Respondent's Vice-President Victory, employees are prohibited for either soliciting or

distributing union literature in any area open to the public or at any area were work is performed. A work area would be defined as one in which the Hospital's employees render patient care. Victory admitted that solicitation as, interpreted by the foregoing no-solicitation rule, would include the distribution of union cards. The Hospital, according to Victory, does not permit solicitation or distribution under the above rule in the Hospital's gift shop, the main cafeteria on the first floor of the central building of the Hospital which is open to the public visiting patients in the Hospital, the Hospital's lobbies, public restrooms, entrances and sidewalks leading to the entrances and parking lot located across the street from the Hospital. It was admitted by Victory that no patient care is performed in any of these areas, although patients do visit some of the areas upon occasion if they are sufficiently well to do so. Normally this would include ambulatory patients but other patients could possibly also visit some of these areas.

As noted above, the gift shop that is located on the first floor of the central or main building of the Hospital and is open to the general public without restriction as is the main cafeteria which seats 100 persons. Although some small percentage of the patients eat in this cafeteria, they must receive permission to do so. The only employees who work in the cafeteria area are those who work in the dietary department. These employees work in the kitchen and in the cafeteria serving line. Normally, other employees enter the cafeteria only for meals or coffee

breaks. Victory admitted that the cafeteria is considered an area where employees and the general public may eat and relax. Although three meals a day are served in a cafeteria, it is open 24 hours a day and food may be purchased from vending machines located in an adjacent area when the serving line is closed down. Additionally, although there are other non-working areas in the Hospital in which employees may purchase food from vending machines, the cafeteria is the only place in the Hospital where hot foods may be purchased by employees and others.

According to Victory employees are allowed to solicit in any area which is closed to the public and which is not considered a work area. Such areas are the employee's lounge in the laundry building and on the fourth floor lounge in the main building. Also included would be the utility rooms and the nurses stations.[3] The two employee lounges are equipped with vending machines where food and other items may be purchased by employees. The lounge in the laundry building is some distance from the main patient care in the Hospital and therefore not readily accessible on short breaktime to the employees who work in the main building of the Hospital. The other lounge, which is rather small and will hold only some

[3] The nurses stations are shut off from the public by glass partitions. However, all of the patient's records are kept and consultations between the various individuals responsible for patient care take place at the nurses stations. It is difficult to understand how this is not considered a work area where solicitation is permitted under the above set forth no-solicitation, no-distribution rule.

25 to 30 employees, is located on the fourth or surgery floor of the Hospital and is used for the most part only as a relief area for those individuals whose duties are concerned with the surgery area.

Although the foregoing does not completely describe all of the Hospital areas, it describes those main areas with which this proceeding is concerned.

In connection with the application of the no-solicitation, no-distribution rule, it has been hereinabove set forth that the Hospital halls and lobbies which are located on the side and the front of the Hospital on 20th Avenue and 21st Avenue in Nashville are considered off limits for distribution or solicitation because they are utilized by the public although they are not patient treatment areas. Accordingly they are not considered work areas. Additionally, there is a parking lot maintained by the Respondent across the street from the main entrance of the Hospital on 20th Avenue. This is for permitted parking by both employees and visitors. These areas are also off limits for solicitation and distribution because of a utilization by the public although they are not work areas.[4]

2. Clyde Russell French—Union Activities —Respondents Reactions

French began to work for the Respondent as a full-time nursing assistant on November 20, 1972. He continued to work as a full-time employee until Feb-

[4] All of the foregoing from testimony of Respondent's Vice President of Personnel, W. T. Victory.

ruary 1974. At that time French, a student full-time at Vanderbilt University in Nashville, decided that it would be better for him to work only part-time at the Hospital. He therefore requested of his supervisor, Melvin Lightford, supervisor in charge of training and of nursing assistants, that he be changed to a PRN employee. PRN employees are used, as needed, as contrasted with regular part-time employees who work at regular assigned times each week. As a PRN, after February 1974 until May 1974, French normally worked 3 days a week (Thursday, Saturday and Sunday) on the 3 to 11 p.m. shift. According to French, he would know what times and days he would work by consulting with Lightford who would schedule him a week or 2 weeks ahead. This schedule was placed on a Nursing Assistants Assignment Sheet.

The records establish that during the period from February to May 1974, French did not regularly work exactly 3 days, 8 hours a day, each week. The records show that although for 8 weeks during that period French worked 3 days, there were 3 weeks in which he worked only 1 day, 1 week in which he worked 2 days and 1 week in which he worked 4 days.[5]

At French's request, the school year having come to an end, French requested that he be reassigned and was returned to full-time status as a nursing assistant on May 13, 1974. Also, at his request, French was retained on the 3 to 11 shift during this

[5] These figures were adopted from French's timecards which were received in evidence.

full-time working period. He continued in this capacity until, again, at his request on August 29, 1974, French was returned to the PRN pool for the 3 to 11 shift. This was because French was again attending classes as a full-time student at Vanderbilt University. According to the request form signed by French on August 29, 1974, that he be a PRN on the second, 3 to 11 shift, and that he would be available for work from the PRN pool affective the week of September 16, for work on that shift on Thursday through Sunday. The request to transfer to PRN status was granted by Addie Hamilton, assistant director of nursing services. However, as will be set forth below, French did not receive the days or hours of work requested by him during the period following his transfer to PRN status in September 1974.

Sometime in August 1974, while dining with Supervisor Lightford, French learned that the Union was beginning to conduct a campaign to organize the Respondent's employees. This information was given to Lightford and French by another employee. In Lightford's presence, French stated that he thought the Union would be a good idea.[6] Shortly thereafter, French obtained an information card from the Union on which French indicated that he would be willing to undertake committee work. He mailed the card back to the Union and the Union mailed to him, in return, an authorization card which French filled out and signed and returned to the Union.

[6] Lightford did not deny any of this during his testimony.

On September 3, 1974, French called the union hall and informed the union officials that there was much pro-union sentiment at the Hospital. French further stated that he would be willing to help and wanted to meet with the officials to find out what he could do in organizing the employees. Thereafter, pursuant to his request, French met with two union officials. At this meeting, French was given a number of authorization cards and union literature. During the next few weeks, French distributed these cards at the Hospital during his break periods. French estimated, in testifying, that he distributed about 200 cards, normally in the cafeteria. He also made some distribution in the snack bars and locker rooms. Additionally, French distributed cards outside the building. Normally this distribution was made during French's break periods, after work or before work.

According to French, on September 15, in the treatment room of station 8 central south, Lightford told him that a Mrs. Mathis had told Miss Hamilton, assistant director of nursing services, that French was the leading union instigator at the Hospital. French answered that he figured that they knew about the matter of French's union activities but that French was not worried because the law would protect him. Lightford then said something to the affect "we will see about that." [1]

[1] The foregoing from the uncontroverted testimony of French. Although, as hereinafter related there were discrepancies in portions of French's testimony and contradictions which would seem to indicate that at least, in part, he had

According to French, on September 9, after French had applied and was given permission to return as a PRN nursing assistant, he was assigned by Lightford to work on the second shift on September 21, 22, 27 and 29. As noted above, the second shift is the shift which works from 3 p.m. to 11 p.m. On September 17, because French's father was ill and dying and French needed the money, French called Lightford at the Hospital and asked the latter if he could also work the day shift on September 21 and 22. Lightford indicated that he would check out the request to see if the work was available. Lightford also asked French at that time if the latter had received a letter from the Hospital. French answered that he had not. Lightford then told French that there was a letter in the mail for French but did not reveal the contents of the letter. Nor did he indicate in any way that French's schedule had been changed.

Again, on Thursday, September 19, French telephoned Lightford and asked the latter if he had talked to the day supervisor about French's working the first shift on the 21st and 22nd of September. During that conversation, the subject of the letter came up again. French asked Lightford to what address the letter had been sent. French then learned

faulty recall, to the extent that I credit French, or any other witness, only in part, I do so upon the evidentiary rule that it is not uncommon "to believe some and not all of a witness's testimony." *N.L.R.B.* v. *Universal Camera Corp.*, 179 F.2d 749, 754 (C.A. 2). Additionally, in this instance, Lightford, in testifying, did not deny this conversation with French, or its contents.

from Lightford that the letter had been sent to an old address. He thereupon gave Lightford his new address. During that conversation, Lightford told French that his days were being held up for the coming weekend and further stated that the letter would explain it. French testified that he did receive the letter in question on September 20. The letter, which bore no date, but which was mailed on September 16, 1974, according to the certified receipt, stated that after review of the work schedule for nursing assistants in the PRN pool, Hamilton, the assistant director of nursing, found that they did not need French's services on the days he was scheduled to work and that the Respondent would let French know of those times in the future on which there was a need for his services.

On Saturday, September 21, French stationed himself outside the 20th Avenue entrance to the Respondent's Hospital, on the sidewalk, and distributed handbills together with union authorization cards. While he was so acting, he saw Addie Hamilton, the assistant director of nursing services, and exchanged greetings with her. The following day, September 22nd, French returned to the Hospital, to pick up a book and to see Lightford. After arriving at the Hospital about 2:30 p.m., he saw Lightford in the locker room and asked the latter if he needed any extra help that day. Lightford said that he did because only four people were there. French asked Lightford if he could work. Lightford answered that he would have to see Miss Hamilton. Lightford left,

returned and informed French that Miss Hamilton was on the telephone. About 45 minutes later, French was called into Hamilton's office. Hamilton then assigned work to him for that day and also for Friday, September 27 and Sunday, September 29.

During that conversation at which Lightford, Hamilton and French were all present, according to French there was no mention of the letter which had been sent to him. However, Hamilton testified that she asked French if he had received a letter and he specifically stated that he had not. Lightford's testimony in regard to what French stated when Hamilton asked him if he had received the letter is rather vague and in some respects contradictory to both French's and Hamilton's testimony. However, because French did report for work on the 21st, when he was originally scheduled to do so, and by reason of the fact that French went to the Hospital to ask for work on the 22nd, it is more than likely that French was not asked or, at least, did not deny that he received the letter. I therefore credit French in this respect.

In any event, French was assigned to work on the the 3 to 11 shift on that day, September 22. That evening, at about 9 p.m., while French was on his break, he spoke to two dietary employees in the cafeteria. These employees were Jessie White and Alma Johnson. According to French he spoke to these two people for just a brief few minutes and then moved on to another table where he spoke to other employees. French estimated in his testimony,

that he spent approximately 15 minutes on break that night. However, he later admitted that he did not know exactly how long he had stayed on the break and very possibly he did overstay his 15 minute break on that night.

Jessie White, one of the two dietary employees to whom French spoke, testified that the conversation with French occurred at a time when she and Johnson were sitting at a table in the cafeteria, although not on break, after the serving line had closed down. They were resting and smoking cigarettes when French spoke to them. It is obvious, therefore, that French had no way of knowing that these individuals were not on break when he spoke to them. However, in that conversation French did solicit their signing union cards. Their conversation with French ended when Mildred Underwood, the food service supervisor, called to ask White to take a tray to a patient upstairs on a late order. White's estimate of the time that French spent with her and with Johnson was approximately 10 to 15 minutes. White never complained to any Hospital official that French had bothered her in any way or that French had detained her in any way from her work or that he had anyway of knowing that she was not on break at the time he spoke to her. Additionally, White was not in anyway ever reprimanded for having talked with French about the Union during that period.

Although French was unaware of it, while he was talking to White and Johnson in the cafeteria on his break on September 22, he was being observed by Food Service Director Underwood. The details and

the reason for this observation of French by Underwood are hereinafter related.

On September 26, between 6:30 and 7:30 a.m., French again was stationed at the entrance to the Hospital where he again passed out union literature and union authorization cards. On that same day, at about 4 o'clock in the afternoon, French entered the nursing service office to pick up his paycheck for the previous week. When he asked for his paycheck he was told that he would have to talk first to Miss Hamilton. At that point, French looked at the timebook and noticed that he had been removed from the scheduled work for September 27 and 29. He thereupon went into Hamilton's office, where the latter was filling out a form. When Hamilton finished she handed the completed form to French. The form, which was a disciplinary notification, stated that French on September 22, 1974 violated two hospital rules in that (1) he had overstayed his break on September 22 for 10 minutes; that he arrived in the cafeteria at 9:05 and stayed until 9:30 whereas the break was to have been, according to hospital rules, only 15 minutes; (2) during the break in the cafeteria as aforesaid, two dietary employees were stopped while they were on duty and French held a conversation with them until their supervisor asked them to deliver late trays which were waiting. French refused to sign the form after it was given to him although, he made a copy. According to French, the form that he saw at that time stated the violations had occurred on September 26. However, the form

which was introduced into evidence bore the date of September 22.

French testified, without contradiction, that before receiving this reprimand he had not been spoken to by anyone with regard thereto. In any event, before leaving Hamilton's office on that night, he asked why his work for September 27 and 29 had been cancelled. Hamilton told him "the hospital didn't need employees like me who violated their rules." It should be noted that Hamilton, in testifying, did not deny this comment. However, she emphatically stated that she did not inform French that he was either fired or terminated. However, Hamilton testified that she had received complaints from a number of charge nurses and even dietary employees that French had bothered them while they were on their breaks or at dinner in the cafeteria. Hamilton specifically testified that the emergency room charge nurse had complained to her about Hamilton's annoying her in the cafeteria. Hamilton also mentioned the names of three other charge nurses who had told Hamilton that French had bothered them while they were eating their dinners in the cafeteria by sitting down next to them, talking to them, and seeking to distribute literature to them. Hamilton testified that, in one instance, the charge nurse on 3400 told Hamilton that French had such body odor that the nurse had to get up and leave; that she could not sit there. This nurse asked Hamilton if Hamilton could not do anything about French's bothering them while they were on their meal break. Hamilton further stated, on cross-

examination, that at least four people personally told her of French's annoying them. She specifically stated the names of these individuals and their work stations. Hamilton further testified that she had had these complaints about French off and on for a period of approximately 2 months before the reprimand was given to French.

However, upon further cross-examination, Hamilton was asked why she had not spoken to French about any of the foregoing matters. She stated that she did not do so because she did not witness the incidents herself, she could not prove them and was also told about it after a fact. It should be noted, in connection with the foregoing, that none of the nurses who allegedly complained about French to Hamilton were called to verify Hamilton's testimony with regard to these alleged complaints. It would seem that the allegations of French annoying these individuals could have been proven by the nurses themselves. Therefore, I find very thin Hamilton's reasons why she did not speak to French about the complaints, and do not credit her testimony in this regard.

The testimony of W. T. Victory, Respondent's vice president of personnel services, is somewhat confusing with regard to knowledge of French's activities in allegedly overstaying his breaks. On direct examination by Counsel for the General Counsel [8] Vic-

[8] Victory was examined by Counsel for General Counsel as an adverse witness pursuant to Section 43(b) of the Federal Rules of Civil Procedure.

tory was asked if prior to September 22 he had received any reports that French might be overstaying his breaks. Victory's answer was that he did not have any record of it and that he did not remember whether anyone told him prior to that time that French was overstaying his break. On being cross-examined by Respondent's counsel, however, Victory testified, in response to leading questions, that he had been receiving complaints that French was overstaying his breaks and that other personnel would have to have French paged because they could not find him. During his examination, Victory also stated that he had known that French was passing out union literature at the gate to the Hospital and had also been passing out literature to individuals in the Hospital. Victory stated that it was because of these reports that he had directed Mildred Underwood on September 20, 1974, Underwood being the Respondent's food service supervisor, to observe French when he was in the cafeteria and to time his stays in the cafeteria, principally on the time that French spent during his breaks. Victory admitted that he had made no request that Underwood time any other employee of the Hospital because, according to Victory, French was the only employee who had been reported to have overstayed his breaks.

After asking Underwood to observe French, Victory received a report from Underwood that on the night of September 22 French had taken the usual 45 minute lunch dinner break and then from 9:05 until 9:30 p.m. French had taken a break in the

cafeteria. French was reprimanded therefore after this report was made to him. Victory further testified that the employees to whom French was speaking were verbally reprimanded but no written report was made of it. However, as noted above, this conflicts directly with the testimony of employee Jessie L. White, one of the two dietary employees with whom French spoke in the cafeteria on the night he allegedly overstayed his break period. Victory did testify, however, that another employee had been discharged at some other time for overstaying the break period.

Other employees who testified with regard to the written reprimand given to French were Hamilton and Underwood. As noted above, Hamilton is the assistant director of nursing services and the individual who made out and handed to French the written reprimand. She testified that the reason French was timed on the night of September 22, was because all supervisors were advised to do so on about September 16 to make sure that no employees were overstaying their breaks. She admitted however that she, herself, had never received any specific instructions that a time study was to be conducted with regard to how long French spent on his breaks. She further testified that if Victory had given such instructions they did not come through her although they ordinarily would have come through her. This was so because she was the assistant director of nursing services and would have been the chief individual supervising French and who would have been

the individual directly involved in assessing French's conduct.

Underwood testified that she was the individual who timed French's break stay in the cafeteria on the night of September 22. She stated that she did so because of orders she had received from her supervisor either in June or July 1974. The instructions which Underwood received were to time all personnel to see who were overstaying breaks. However, nowhere in her testimony did Underwood relate that she received specific orders from Victory to single French out for time study. Additionally, Underwood admitted, in testifying, that she had never noticed French in the cafteria before the night of the 22nd and the reason that she noticed him that night is because he was soliciting and passing out literature. However, she also testified that the reason that she was looking at French, that she knew how long French had stayed in the cafeteria, was that because she happened to look at the clock as French entered. When asked again as how she came to clock French, Underwood answered that she just happened to look at the clock and notice when French came in and she happened to notice when he went out because he was carrying a tray and she was responsible for trays falling off the return area on which soiled or used trays were placed. Underwood also testified that French had stayed only 45 minutes on his dinner break. How she would have known this without having specifically noticed French, whom she said she did not notice before he solicited for the Union, is questionable.

Accordingly, I find and conclude that Underwood was specifically told by someone to check French on the night of September 22. Additionally, Underwood stated on further cross-examination that she did not particularly single French out but watched everybody on the night in question. When further questioned as to how many people came through the cafeteria during the time that French took his break period that night she estimated about 75 to 100 people. Then, Underwood further stated that even though other people came and left the cafeteria at various times she would know if any of them had overstayed their breaks. I find this testimony to be incredible.

At about the time all the foregoing was happening, French's father became seriously ill, and, a short time thereafter, died. French was, therefore, short of funds and, according to his credited testimony, he was forced for financial reasons to withdraw from full-time studies at Vanderbilt University and, on October 10, applied for full-time employment as a nursing assistant by submitting a written request. This request form which was signed by French on October 10, stated that he requested full-time status available any shift, 7-3, 3-11 or 11-7 immediately. The request stated that French's father was seriously ill and that he had to withdraw from school and needed to start working full-time.

Later, according to French in the middle of November, he informed Victory that he would prefer the 3 to 11 shift for full-time work. However, French did not insist on this and did not, in fact, withdraw

his request for full-time work on any shift. French testified that the reason that he was still able to work any shift although he would have preferred the 3 to 11 shift was that he had obtained a position working at a laboratory at Vanderbilt University. However, he further stated, that he could accommodate to this and could arrange his hours of work at Vanderbilt to fit into any schedule given to him by the Respondent.

In any event, French's request was never acted upon and he was never placed on a full-time basis. Respondent's records reflect, however, that between October 10 and the middle of November, the date estimated by French on which he informed Victory that he would prefer the third shift, five employees were hired as full-time nursing assistants. Two of these individuals were hired for the third shift. Additionally, from the time that French made his application on October 10 for full-time nursing assistant work until the date of the hearing herein the Respondent's records reveal that a total of 12 full-time nursing assistants were employed and that even after the middle of November 1974, one full-time nursing assistant was rehired for the third shift.

On the same day on which French made application for full-time work, he was informed in the cafeteria by a fellow employee that the no-solicitation rule, hereinabove set forth, had been posted. Upon receiving the information, French left the cafeteria, followed by his immediate supervisor, Lightford, who explained to French that the Respondent did not

want French to go upstairs alone. French proceeded to the fourth floor of the main building of the Hospital where he had been informed the no-solicitation rule was posted. French, accompanied by Lightford went to the fourth floor and preceeded down the hall to the place where the employees' timeclock is located. Near the timeclock was a display case in which was posted the no-solicitation rule herein referred to. French and Lightford had a short discussion with regard to the rule and French then proceeded to copy the rule. At this point, Lightford was paged and had to leave, leaving French alone. As French was busy copying, a fellow employee, Jack Johnson, approached and asked French if the latter wanted the rule. French indicated that he did, whereupon Johnson inserted two fingers between the bulletin board glass cover and the back of the bulletin board, removed the notice and handed the same to French. French took the notice and left the building.[9]

According to Victory, the area through which French passed in order to copy the notice, as aforesaid, is a sterile area through which employees may not pass in street clothes. This is because, according to Victory, it is immediately adjacent to the operating room area of the Hospital. However, as noted above, French was accompanied through this area by Lightford who said nothing to French when they were passing through the area and in no way attempted to stop French from proceeding through the area, merely

[9] From uncontroverted testimony of French which testimony is hereby credited.

stating that the Respondent did not want French wandering through the Hospital unaccompanied.[10]

As noted above, no action was taken on French's application to become a full-time nurses aide dated October 10, 1974. However, as testified by Hamilton, French was not discharged or laid off at any time, including the date of September 26, when French was reprimanded. However, although retained on a PRN status, French worked only 1 day during the week ending November 17, 1974, 1 day during the week ending December 22, 1974, 1 day during the week of January 26, 1975, 1 day during the week of March 16, 1975, and 1 day during the week of March 23, 1975. Thus, he worked only for five approximately 8-hour shifts from October 10, 1974, the date French applied for full-time employment, until the date of the hearing herein. This record of 5 days work for the total of these foregoing months when compared to rather regular 2 to 3 day work periods which French received as a PRN from February to June 1974 leads inevitably to the question of why French received so little work after October 10, 1974. The conflicting testimony and the explanation for this as given by French and as given by Victory and Hamilton must hereinafter be resolved. Because the testimony regarding French's assignments after his union activity became known to the Respondent is rather lengthy, the following is but a summary of such testimony.

[10] Lightford did not testify with regard to this incident. Accordingly, I credit French.

According to French, although he was working as a full-time employe at the chemistry laboratory at Vanderbilt University, he nevertheless made it known to Victory and to other Respondent officials that he was available for work. This is outlined above in French's explanation as to the reasons for his filing for full-time employment on October 10 on any shift and the notification during the middle of November to Victory that he would prefer assignment as a full-time employee on the 3 to 11 shift. French testified further that during this entire period of time from, October 10 until the date of the hearing, he was either not asked to report for work at all, or else received word of his possible assignments either by letter or by verbal communication and messages left for him at the laboratory at Vanderbilt too late for him to arrange to be at the Hospital when he was scheduled to work in the chemistry laboratory, as aforesaid. He further stated that there was a time, either in November or December, when his father ultimately passed away and he was unable to report because he went to his father's funeral out of town and was caught in a snow storm on the way back. He stated, however, that he frequently checked with Lightford with regard to the scheduling and was not told by Lightford of any assignments except on those days on which he ultimately worked. He said this contrasted with the previous spring of the year when he was told by Lightford a week in advance on which days he would be working.

On the other hand, Victory testified that there were a number of reasons why French worked so seldom after September 26, 1974, and why French was not made a full-time nurses assistant. Victory testified that there are three classifications of employees. The first classification are full-time employees who work regularly scheduled workdays and have full, regular scheduled workweeks. A part-time employee, a second category, is an employee who works a regular schedule for less than a full week. In other words such employee would work the same number of hours on the same day each week. Then, according to Victory, there is the third classification in which French was placed upon the latter's request. This is the classification of PRN, who according to Victory, "are people that we usually call in, in the event we have absences or vacations to fill or, these type things, but we can call these people just as the term denotes, as they are required. They do not have any set number of days to work, they do not have any certain days to work. A PRN person might be called 15 minutes before a shift. Someone calls in and says 'I can't come in' or is in an accident, and we might call a person with a PRN status vith very little notice."

This testimony by Victory was supported by the testimony of Hamilton, assistant director of nursing services, who explained that, "PRN personnel are used when they are needed in any capacity from R.N.'s to supervisors. Does that answer the question? They are used to fill in when we have a need for

them." When asked if PRN's were guaranteed or promised any number of hours per week, or month, or year, Hamilton answered in the negative. Additionally, Victory testified that the PRN pool had an excess of 100 individuals.

As noted above, French testified, without any contravention, that when he was a PRN from the period of February to June 1974, he worked almost consistently the same hours each week and was given fairly steady work. The Respondent's records show that French was not given the same amount of work time each week. Moreover, French did admit, on cross-examination, that Lightford, his immediate supervisor, assigned the work to him on a week to week basis and that he was not necessarily assigned the same amount of work each week even during the earlier period.

According to Victory, increased costs of operating the Respondent's hospital became manifest doing 1974 and because of those increased costs measures had to be taken by the Respondent in order to economize. Victory testified that one of the measures taken was to require the approval of filling all vacancies only by the Hospital president or vice president in order to cut down on personnel of the cost of the operation of the Hospital. Energy costs, another factor, have, over the period of time involved in this proceeding, been reduced considerably. Additionally, with regard to the personnel, there are fewer employees now quitting their employment at the Hos-

pital. This has resulted in a decrease in the turnover of personnel of 30 percent. Moreover, according to Victory, qualified, experienced personnel have been seeking employment at the Hospital in large numbers during this same period.

Hamilton testified that the day that French was transferred from full-time to PRN status at his own request, September 16, 1974, the Hospital's executive committee issued instructions to all supervisors to examine carefully the assignments and use of PRN's and to make certain that they were absolutely necessary before assigning work to them in order to avoid unnecessary costs.

French, as hereinbefore set forth, admitted that there were a number of times that he was offered work after September 26, 1974, when he was unable to work for reasons that the notification came too late, or that he was already committed to work in the laboratory at Vanderbilt, or that he did not receive the request for one reason or another. When questioned by Respondent's counsel as to how many total days he was offered work as a PRN after September 22, French said that he counted a total of 9 days. However, he admitted that he only worked 5 of these 9 days. These were the 5 days heretofore referred to that French worked after the commencement of his union activity.

Introduced into record at the hearing were the nursing assistant assignment sheets for the Hospital commencing with the week of August 12, 1974, through the week of March 24, 1975. These, evi-

dently, represent not the actual days worked but the days assigned by Lightford to the nursing assistants. While these sheets indicate very strongly that French received only a very few assignments, they also indicate that commencing with the latter part of September, 1974 only a minimal number of hours of work were given for the entire period to any PRN nursing assistants. In fact, the only nursing assistant who consistently received work almost each week and, who was also a PRN, was Michael Sykes, who evidently was very well qualified to work in the emergency room, where Sykes was almost consistently assigned. There were also two other PRN nursing assistants who received more work than did French. These individuals were Woodfin and Burn. These individuals were assigned work for the most part on weekends, the very times on which French expressed his desire as a PRN to work. However, even their assignments were not consistent, and it is not clear that they actually did work in uniformity with the assignment sheets.

Additionally, it should be noted that although French requested as a PRN to work weekends most of the assignments he did receive for the period from late September 1974 through March 1975 were assignments for work during the week. Thus, the times when French requested work on the weekends were not given to him. French testified, without any contradiction from Lightford, that Lighford told French the reason the latter was not assigned weekend work was that Respondent did not want French working

in the Hospital at a time when hospital officials were not there to observe French's activities.

The Respondent, aside from the economic situation as outlined above, offered additional testimony with regard to the quality of French as an employee, presumably to show that there were additional reasons why French was not given more work. In the first place, according to Respondent's witnesses, French as a PRN was treated no diffierently than any other PRN. Heretofore set forth is the data which shows that there were almost no PRNs used to any extent between September 26, and the date of the hearing herein. In addition, French's own testimony contains admissions that there were times when he was called to work when he was unable to do so or when word of request by the Respondent for French to report for duty as a nurses assistant was not conveyed to him until it was too late for him to make plans and to arrange with the laboratory in which he was working full time for time off to report for work at the Hospital. French maintained in his testimony that there was no difference between a PRN or a part-time employee. To an extent, this is borne out by the fact that, as pointed out by the Counsel for the General Counsel, there is no mention of PRN's in the Employees Handbook, but only of part-time employees. Additionally, a personnel change of status sheet introduced into evidence showing the status of French's transfer to "part time," uses the word "part time" in one instance and the form does not have a provision on the form to check for type of

employment for PRN. What is checked on the form is a box along side of which is printed "part time." However, on the same form toward the bottom, is a written notation as follows: "37-PRN" and in the same section "vacation accrual date-00000" having an effective date of February 11, 1974. On the other hand, the same form used to show the effective date and the transfer of French to full-time status as a nursing assistant dated May 13, 1974, shows the box called full-time checked off and a vacation accrual date of May 13, 1974.

However, this would seem to be rather confusing, the General Counsel arguing that there is no difference between PRN and part time and Victory contending that there is a difference in that the part-time employees are regular part time whereas PRNs are only called as needed. There is insufficient testimony in the record to make a competent judgment with regard to whether there is a difference between these two classifications. However, because of my decision herein, as hereinabove related, I conclude that there is no particular impact on the case regardless of whether French was a PRN, a part-time employee, or whether in fact there is a difference between status of either of these two categories.

The balance of the testimony with regard to the reasons for French's not receiving work are basically set forth above and they include the Respondent's inability to contact French for scheduled work; the giving of false information on September 22 to Hamilton to the affect that he had not received the letter

of September 16, hereinabove discussed, interfering with the work of other employees and overstaying of the break with the facts which are hereinbefore set forth; the incident of October 10, 1974, with regard to appearing in the sterile area in street clothes and, also, the taking of the notice of the no-solicitation rule from the bulletin board and away from the Respondent's premises.

There was one further incident with regard to French and his conduct in the Hospital which had not been heretofore set forth.[11] French testified that on approximately January 30, 1975, he arrived at the Hospital to pick up his paycheck for work he had performed. When he arrived at approximately 6 p.m., he stopped in the cafeteria. There he saw another employee with whom he was acquainted. As he began to sit down to talk to the other employee, he was approached by assistant vice president of Respondent, Joe Hampton, who told French, "French, you know what I told you the last time you were here." French replied that he did. French admitted in his testimony that he had had a previous altercation with Hampton on December 26, 1974. Hampton then asked French to leave the cafeteria. French replied by asking if the cafeteria was not open to the public to which Hampton replied "Not for you it isn't French."

Upon this remark from Hampton, French stated that he would not leave the cafeteria and proceeded

[11] The complaint allegation with regard to this incident was made as an amendment to the complaint at the opening of the hearing herein by the General Counsel.

to sit down with the other employee. Soon thereafter two security guards approached French and asked him to leave. When he refused, they escorted him to get his paycheck and then out of the building.[12]

C. *Defenses, Contentions, Discussions & Conclusions*

1. The No-Solicitation Rule

Counsel for General Counsel contends that the no-solicitation clause, as written, is invalid on its face. He takes no issue with the prohibition written into the no-solicitation rule with regard to the prohibition of solicitation during working time in work areas which are not accessible to or utilized by the public, or the prohibition against distribution of any kind in any working area at any time. However, he does take issue with that portion of the rule which prohibits solicitation of any kind at any time in any area accessible to, or utilized by, the public. I would agree that on its face the rule in this respect is invalid. The Board and the Courts have long held that rules which prohibit solicitation during nonworking time and in nonworking areas are unlawful unless it is shown that "special circumstances" make the prohibitory rule necessary to maintain production or discipline.[13]

[12] From uncontroverted, credited testimony of French. Hampton was not called by Respondent to testify.

[13] *Walton Manufacturing Company*, 126 NLRB 697 enfd. 289 F.2d 177 (C.A. 5); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615; *American Coach Company*, 158 NLRB 415.

However, Respondent contends that there are "special circumstances" presented here which must be taken into consideration in order to decide whether the foregoing rule is valid or unlawful. Otherwise put, the Respondent contends that in the case of nonprofit health care institutions a different rule should apply because (a) The only business of the Respondent is health care and the solicitation for union membership or the distribution of union literature within certain nonworking areas of such institutions, even on nonworking time, could have the tendency to interfere with such patient care and, (b) in amending the Act in 1974,[14] the Congress intended to treat nonprofit hospitals differently than other health care institutions and other businesses of all types. The Respondent's defense with regard to "special circumstances" shall be discussed first.

The respondent has had for a number of years, an employee handbook entitled "Inside Baptist Hospital." This handbook was revised on August 1, 1973, before the revision of the Act, as above set forth. In this revised addition is contained a set of principals by which the Respondent expects its employees to comply. Each employee is supplied with a copy of this handbook and, in fact, there is a tear-out sheet in the handbook which the employee must sign as a receipt for delivery to such employee of the handbook.

The various policies set forth in the handbook contain much emphasis upon patient care. Thus, the

---

[14] Public Law 93-360, 93rd Congress, S-3203, July 26, 1974.

handbook states that the Respondent exists solely to provide superior medical care to patients and that the goal is "to treat all patients with sympathy, kindness and understanding, realizing that sickness and hospitalization may be a new and trying experience." The handbook in other places has other cautionary and policy language with which employees are required to comply. Some of these read as follows:

> "Even casual conversation with other employees may be overheard . . . be particularly careful about your conversation in elevators, eating places, and other places of public assembly within the hospital."
>
> "You are urged, therefore, to refrain from loud talking and laughing, gossiping, needless complaining and *any other activity* that would be disturbing to the patient or out of place in a hospital."

On another page the handbook states:

> "Noise deters patient treatment and recovery. It is each employee's obligation to avoid unnecessary noise in the hospital. Speak in a quiet, pleasant tone . . . employees should be alert for sources of unnecessary noise and to report these promptly to their supervisor."

In other portions of the handbook the Respondent cautions that the proper handling of difficult persons is important in order not to disturb the patients and that employees are asked to remember that visitors to the Hospital are frequently upset and unfamiliar with Hospital regulations.

The handbook also contains the original no-solicitation rule which is quoted hereinabove to the effect that solicitation is strictly prohibited anywhere in the Hospital without the approval of the Hospital administration and that violation of such policy would subject employees to disciplinary action.

Victory testified that even before learning of the revision to the Act or the Union organizing campaign, the Respondent retained counsel to review its personnel policies and procedures. Respondent's counsel, accordingly, reviewed, among other things, the employee handbook and the no-solicitation rule that was contained therein. Counsel advised Respondent to further clarify, in writing, the foregoing no-solicitation rule and to post the clarification on the Respondent's premises. Admittedly, the change in the Act came at approximately the same time that the Union's organizing drive began. It was during this period of time, from the time in August that the revision of the Act became effective, and the organizational drive began, and October 4, 1974, when the new rule or clarification of the old rule was posted, that the Respondent's counsel was engaged in the study of the personnel policies and, in particular, of the no-solicitation rule. As a result of the study, the revised, rule was posted on October 4. This is the rule which was taken by French on October 10. The rule is heretofore set forth in full. The portion of the rule with which the General Counsel takes issue is repeated here as follows:

> "No solicitation of any kind, including solicitations for membership or subscriptions, will be permitted by employees at any time, including work time and nonwork time, in any area of the hospital which is accessible to or utilized by the public."

This is the portion which Respondent contends should be judged lawful as well as the other portions because of "special circumstances" revolving from patient care as set forth in Respondent's handbook.

To sustain its contention that special circumstances exist, the Respondent offered the testimony of three witnesses, the first of whom was Victory. He testified that the revision of the rule was merely to clarify and that it was the same rule which had been in existence for many years as set forth in Respondent's handbook and, moreover, the existence of which every employee was apprised. Additionally, both employees White and French admitted in testifying that they were aware of the rule as long as they had worked for the Respondent and that the forbidding of solicitation of any kind in any area of the Hospital had been the rule long before the advent of the Union.

Called as expert witnesses were two physicians, both of whom performed surgery work at the Hospital. The first of these witnesses was Dr. Russel T. Birmingham, former profession of obstetrics and gynecology, many of whose patients were admitted to the Respondent's hospital for surgical and gynecological care. The second expert witness was Dr. Greer Ricketson, a plastic surgeon and, at the time

he testified, a clinical professor of plastic surgery at Vanderbilt University Medical School. He, like Dr. Birmingham, had many patients at the Respondent's hospital. Both of these physicians testified generally to the necessity for keeping patients calm and also for keeping patients' families as calm as possible. This was because of the psychological factor involved in the recovery process. They also testified that even an upset in pre-surgery, where a patient may not necessarily be bedridden and could even be ambulatory and have free access to the various portions of the Hospital, could have a marked effect on the success of surgery and also on a patient's recovery after such surgery, since a patient's well-being mentally and psychologically is a necessary factor in quick and complete recovery from the traumatic experience which most people must undergo upon entering a hospital or upon being submitted to surgery. They also testified that the patient and the patient's family are under great psychological stress, and that an upset to the patient's family could affect the patient in such a way as to adversely affect the patient's recovery. They were each then asked the hypothetical question with regard to whether a discussion concerning a union could affect a patient in a deleterious manner. Their answers were to the effect that if the discussion were to become volatile or hostile in any form, the discussion could definitely have the potential for adversely affecting the patient and the patient's family.

I do not believe that there is anything new or unusual in what the two doctors have testified. I believe

that even a layman would have the ability to realize that things could occur in a hospital because of arguments or any volatile conduct which could upset a patient's well-being.

Victory also testified to the effect that patients, especially those that are ambulatory and have small children who cannot visit the patient in his room, frequently visit the public places of the hospital such as the hallways, the gift shops and the cafeteria which is open to both the public, patients, and hospital personnel. Thus, the Respondent argues from all of the foregoing that union solicitations or distribution of union literature in any of the public places in the hospital could possibly affect the well-being of patients in the hospital and could delay the recovery of such patients. These then, according to the Respondent, are the "special circumstances" which it is necessary to consider in assessing the validity or unlawfulness of the rule as it was expanded, or as Respondent claims, clarified.

Careful consideration of all of the foregoing and a complete study of the testimony of Victory and the two physicians who testified as expert witnesses, convinces me that there is no difference between patient care in a nonprofit hospital or in a hospital which is proprietary and run for profit. The 1974 revision to the Act, which gave the Board jurisdiction over nonprofit hospitals, also set forth revisions to various portions of the Act to prevent strikes and other activities on the part of unions and union members except under certain conditions. However, neither the

Act revisions or the Legislative History thereof indicate that the Board should treat differently with employees involved in patient care in nonprofit hospitals as compared with proprietary hospitals. In other words, there is nothing in the revision, as I view such revision, or the Legislative History of such revision, to indicate that the Board should treat proprietary and nonprofit hospitals differently insofar as its assessment of no-solicitation rules are concerned. Therefore, it is necessary to review the Board's precedents concerning no-solicitation rules as the Board has found them in cases involving proprietary hospitals, nursing homes or other patient care institutions which are not classified as nonprofit institutions.

There is no doubt that patient care is the primary concern of any hospital including the Respondent's. Nor is there any doubt, as testified to by the medical experts called by the Respondent, that psychological impact can be either helpful or traumatic depending upon the circumstances in which the patient is placed. If the patient is placed in a tranquil situation his chances of recovery are far greater than if the patient is placed in a situation of turmoil. Moreover, as testified by Dr. Ricketson, a patient whose recovery is either delayed or interfered with by the activities of employees of the Hospital could possibly sue the hospital for malpractice, in which event, the cost of medical attention and nursing care in the Hospital would be affected. Nor is there any doubt as to the sincerity of the testimony of the two physicians who testified that the rule in question is necessary for

proper patient care and that the attitude of the patient and of his family have a marked effect upon the recovery of the patient. The question presented by this testimony is whether it is of such weight that the right of the employees to solicit in nonworking public areas of the hospital on nonworking time should be prohibited.

Counsel for the General Counsel contends, and the complaint alleges, that the adoption of the revised no-solicitation, no-distribution rule and the timing of such adoption was in response to the union campaign and was promulgated for the purpose of interfering with the campaign by interfering with the employees rights to organize. The only testimony in the record with regard to the basis for the adoption and promulgation of the revised rule was that of Vice President Victory.

Upon direct examination, as an officer of the Respondent, by Counsel for the General Counsel, Victory testified that he became aware of the union campaign in mid-August 1974. Victory further admitted, on direct examination by Counsel for the General Counsel, that the revised rule was revised and promulgated because of this campaign. Although Victory maintained that the policy really has not changed and that the same, basic no-solicitation policy had been in effect for years, he did admit that the revision was a direct result of the union organizational campaign and that this campaign was what prompted the change. On cross-examination by the Respondent's own counsel, Victory testified that sev-

eral months before the date of the adoption by Congress of the amendment to the Act bringing nonprofit hospitals under the coverage of the Act, Respondent had requested it's attorney to review all of the Respondent's personnel policies. As a result of this review, Respondent's counsel advised the Respondent that the rule should be clarified and this advice resulted in the promulgation and posting of the revised rule on October 4, 1974. Further, although Victory maintained that the revised rule was merely a further explication of Respondent's existing policy on solicitation, he admitted that the former rule was aimed primarily at keeping outside salesmen from soliciting business in the Hospital. Moreover, he further admitted that the revised rule was addressed to employees.

Additionally, Victory admitted that no physicians were consulted with regard to whether there was a medical necessity for a revision in the rule prior to its adoption and promulgation. He further admitted that no physicians were ever contacted with regard to this rule until after the complaint in the instant proceeding had been issued. Although employees French and White both admitted, upon cross-examination, that in years past the Respondent had enforced its earlier no-solicitation rule against salesmen coming on to the premises and soliciting in the cafeteria which was open to the public, I conclude that this does not in any respect alter the purpose of the promulgation of the revised rule.

As noted above, there is a distinct conflict between Victory's direct testimony, given in response to questions put to him as an agent of Respondent by Counsel for the General Counsel, and his testimony on cross-examination by the Respondent's counsel. Because of this conflict, and upon my observation of Victory while he gave the foregoing testimony, I am convinced that Victory was not wholly straightforward in stating, on cross-examination, that the revision of the rule in question was adopted as a result of the 1974 amendment to the Act. I am likewise convinced that the revision was directed at employees specifically rather than at outside salesmen in order to prevent solicitation for the Union on Respondent's premises. In arriving at this conclusion, I have considered not only the conflicting testimony given by Victory but the very timing of the revision so soon after the advent of the Union and French's open participation therein.

The Board has held that a broad no-solicitation rule which prohibits union solicitation in all public areas of a nursing home may be lawful where extraordinary circumstances are shown,[15] and although the Board in one case[16] has held that a broad no-solicitation rule somewhat similar to the rule involved herein was valid under the circumstances of that case, the Board in that case noted that the rule in question had *not* been adopted in response to a

---

[15] *Summit Nursing Home, Inc.*, 196 NLRB 769.

[16] *Guyan Valley Hospital, Inc.*, 198 NLRB No. 28.

union campaign. There is no conflict or contradiction between the decision in the *Guyan Valley* case or in the *Summit Nursing Home* case, heretofore cited, because of the *Summit Nursing Home* case the Respondent's rule was adopted *in response* to the union's campaign. Also, the Board noted in *Guyan Valley* that the rule involved in that case prohibited solicitation only in the hospital's working area, whereas in the case at bar the rule prohibits solicitation in any area accessible to, or utilized by, the public, whether a working area or not a working area.

Thus, there remains for consideration, the question of whether, in the light of these precedents, the alleged "unusual circumstances" here attempted to be shown by the Respondent are sufficient to warrant a departure from the general Board policy of finding violative no-solicitation rules which prohibit solicitation in nonworking areas on nonworking time. I cannot conclude, despite the testimony of Victory and the two eminent physicians, that there is warranted the adoption of a policy with regard to Respondent's Hospital which is so radically different from the policy adopted heretofore by the Board with regard to other health care institutions. As stated by the Board in the case of *Summit Nursing Home, Inc.*,[17] "The rule was promulgated only after the Union began its organizational campaign. Nor does the record show that any unusual conduct by its employees or union organizers made the rule an overriding ne-

[17] 196 NLRB 769, 770.

cessity. We find that the rule was adopted, not because of, but in anticipation of, possible adverse conduct, and the record is lacking in any evidence that the work of its employees was impeded or in any major aspect affected by the advent of the Union."

It is noted that the testimony of the physicians in the instant case was directed to *possible* effects of union campaigns and was given pursuant to certain hypothetical questions. These questions involved what might be considered the *possible* consequences of *possible* violent reactions of employees to union solicitations or the distribution of union literature. However, there is no evidence in the record of sufficient substance to show that the conduct of the Union or any of the Respondents employees was of such nature as to make the rule an overriding necessity. Moreover, there are other sections of the Respondent's "Employee Handbook," which would, or could, be utilized by the Respondent to discipline an employee engaged in union solicitation who does not otherwise conform to the rules of employee conduct.[18] Thus, there exist, witnout the necessity to prohibit all union solicitation anywhere on the Respondent's premises on nonwork time, rules which prohibit unruly conduct by any employee, including one engaging in otherwise lawful union solicitation. Additionally, even newspaper articles or television or radio broadcasts available to patients could possibly be more upsetting to a patient's psychological well being than

[18] See e.g., Employees Handbook, Aug. 1, 1973 revision, PP. 15 *et seq.*, "Employee Conduct" and "Noise."

the observation by a patient of quiet and mannerly union solicitation of one employee by another. Yet, it is highly improbable that the Respondent would care to eliminate these means of communication from the world outside the Hospital.

Accordingly, I find and conclude that the current no-solicitation, no-distribution rule is overly broad, interferes with employees Section 7 rights and that its promulgation and maintenance are violative of Section 8(a)(1) of the Act.

2. The Reprimand of September 26

Counsel for the General Counsel contends that the Respondent issued the reprimand of September 26, 1974, to French because the latter engaged in protected union activity by soliciting on behalf of the Union in the Respondent's cafeteria and distributing union literature at the entrance to the Respondent's Hospital. The Respondent, on the other hand, defends against this contention arguing that French violated two of its rules of employee behavior in that he overstayed his leave time on the night of September 22 when he solicited union membership of employees White and Johnson in the Respondent's cafeteria and secondly engaged in solicitation of White and Johnson while the latter two individuals were actually on duty and not on nonworking time.

As heretofore set forth, the testimony of Victory, Underwood and Hamilton with regard to the reasons and the background for the issuance of the September 26 reprimand is somewhat confusing and in some re-

spects conflicting. To restate that testimony would unnecessarily lengthen and burden this decision. However, it is necessary at this point to summarize, to a certain extent, the said testimony. In sum, Vice-President Victory testified that before September 22, he had received no complaints with regard to French's overstaying breaks. However, on cross-examination Victory testified to the contrary, stating, in response to leading questions, that he had received numerous reports that French had been overstaying his breaks. Victory also, in his testimony, stated that he had known at that time that French was passing out union literature at the gate of the Hospital and that, accordingly, he instructed Food Supervisor Underwood to check the times that French spent in the hospital cafeteria. He stated that he had so directed Underwood on September 20, 1974, 2 days before French actually had been involved in the union solicitation of White and Johnson on September 22. Additionally, Victory testified that after Underwood had reported to him that French had overstayed his leave, he decided to have French reprimanded and, furthermore, the employees to whom French was speaking, namely White and Johnson, were verbally reprimanded.

Hamilton testified that French was timed on the night of September 22 because all supervisors were advised to do so on September 16 to make certain that no employees were overstaying their breaks. However, as is noted, Victory testified that only French's stay in the cafeteria was to be observed. Further-

more, Hamilton admitted that she had no knowledge of the fact that only French was to be timed with regard to his breaks and further testified that if Victory had given such instructions they would have come through her because she, as assistant director of nursing, would have been the one to order that French be timed during his stays in the cafeteria.

Underwood, who actually timed French's break stay in the cafeteria on the night of September 22, stated that she did so because of orders she had received from her supervisor either in June or July of 1974, several months before Victory, himself, testified that he gave the orders for such timing. Underwood, like Hamilton, stated that the instructions were that all personnel were to be timed. In her testimony Underwood did not relate that she received specific orders from Victory to single out French for time study. Underwood further testified that she had never noticed French in the cafeteria before the night of September 22 and the reason that she noticed him on that night was because he was soliciting and passing out literature. She further stated that she knew how long French had stayed in the cafeteria because she just "happened to look at the clock" as French entered. Additionally, Underwood testified that she also timed French on his dinner stay that night and he had only stayed the proper 45 minutes. However, only moments before this testimony was given she testified, as set forth above, that the only reason she noticed French was that he was passing out union literature which he had not done at the earlier time.

There are similar portions of Underwood's testimony which cannot be reconciled with other portions of her testimony.

Also, as noted above, it was on September 26 that French openly was passing out union literature at the Hospital entrance before he entered the building on that day to receive his paycheck. It was then that he was told he had to report to Hamilton before he would receive his check. When he did so he received the reprimand set forth earlier in this decision. Additionally, French testified, credibly, that at the time he received the reprimand it was dated September 26, but the copy that was introduced in evidence at the hearing was dated September 22. Moreover, French further testified, without contradiction by Hamilton who testified after French, that when he was told he would not have to work on September 27 and 29 as he had originally been scheduled, Hamilton told him "the Hospital didn't need employees like me who violated their rules." Hamilton, in testifying, merely denied that she had discharged or terminated French.

In view of the foregoing testimony, and in view of the fact that not only did the testimony of the three Respondent witnesses, Victory, Hamilton and Underwood conflict, but in the case of each individual who testified, that individual's testimony conflicted with other parts of the same individual's testimony. Accordingly, I am unable to credit the reasons assigned by the three for the written reprimand given to French.

Therefore I conclude that the actual reason for French's receiving the reprimand on September 26, was French's union activity which culminated on that day in the passing out of union literature at the entrance to the Hospital. I find the reasons assigned in the written reprimand to be pretextual and conclude that the reprimand was given in order to discourage not only French, but also other employees, from engaging in the activity of soliciting fellow employees to join and support the Union. In arriving at this conclusion I have considered, in addition to the above, the timing of the reprimand, and Hamilton's statement to French to the effect that the Hospital did not need employees who violated the rules. I have not overlooked the fact that French did actually overstay his grace period. French admitted this overstay in his testimony. However, in view of all of the circumstances surrounding the giving of the reprimand, and in view of the fact that Victory testified that the employees to whom French spoke on the night of September 22 were verbally reprimanded, and in view of the fact that employee White testified credibly that she had never been spoken to in any manner with regard to her conversation with French on that night, I find and conclude that the mere overstaying of his break by several minutes was not the true reason for the giving of the reprimand to French. Furthermore, it should be noted that when French spoke to these employees, although they were still on actual worktime, and not on breaktime, they were not actively on duty and were sitting at a table in the cafeteria smoking and chatting and, obviously, not at work. It was only after French commenced speaking to them, that Underwood ordered these employees to take trays to patients.

Accordingly, by reason of all of the foregoing I find that the reprimand of French dated September 22, but actually given to French on September 26, was made for the purpose of discouraging the union activity of French, and others, and was, accordingly, violative of Section 8(a)(3) and (1) of the Act.

3. The Respondent's failure to assign work to French

The question presented is whether the failure of Respondent to assign French, upon French's October 10 application, to a full-time nursing assistant position was the result of calculated discrimination or, as Respondent contends, was the result of a lack of need for such assistants brought about by diminishing turnover of employees, possibly by reason of the recession, together with a plethora of qualified applicants for whatever openings Respondent had. Also, Respondent presented testimony to the effect that French desired work only on the 3 to 11 p.m. shift and, moreover, had engaged in less than honorable conduct and had violated Respondent's employee behavior rules. If the foregoing did constitute the sole reasons for Respondent's failure to grant French's application for full-time employment, then it follows that the refusal to grant French's application was not violative.

However, the principal witness presented by the Respondent to support its contention that work as a

full-time nursing assistant was denied French for good cause was, again, Vice-President Victory. I have heretofore disposed of Victory's testimonial accusations against French with regard to the removal of the newly posted revised no-solicitation rule from the Respondent's bulletin board. I have credited French's testimony to the effect that another employee actually removed the document and handed it to French. However, French's participation in this particular episode does substantiate the fact that French did engage in conduct which was less than completely proper. Although on the day in question French did enter the surgery area on the fourth floor of the Hospital where Victory testified employees were not permitted to enter unless properly clothed in surgical attire, as noted above, French credibly testified that he was accompanied to the fourth floor, through the surgery area, by Lightford, French's immediate superior, and Lightford did not deny French entry into the area nor did he later on reprimand French for doing so. Lightford did not in any way controvert French's testimony in this respect.

With regard to other matters, Victory testified that the turnover of employees during the period involved herein was very small, that there were many qualified applicants for the positions open and, generally, French was not an ideal employee in that he violated Respondent's rules. However, I have in other instances refused to credit Victory's testimony and I cannot in this instance, therefor, credit Victory's testimony to the effect that there were many qualified

applicants for a very few jobs because of the fact that the employee turnover was so small. Victory's testimony in this regard is unsupported by any records offered in evidence by the Respondent or by any other testimony. Therefore, I do not credit Victory's unsupported testimony with regard to these reasons why French was not assigned the requested work.

Victory further testified to the effect that French desired only to work on the 3 to 11 p.m. shift and that there were no openings on that shift for French. However, the Respondent's own statistical records show that French's application for full-time work was for any shift. It was approximately one month later that French informed Victory that he would prefer the 3 to 11 p.m. shift, but did not withdraw his application for assignment to other shifts. This was explained credibly by French in that he could arrange his work at the Vanderbilt University laboratory in such a manner as to accommodate for any shift that Respondent saw fit to assign him. Additionally, from the date that French made application for full-time status until he informed Victory that he would prefer to work the 3 to 11 p.m. shift, five new nursing assistants were hired as full-time assistants, two of them on the second shift. Moreover, from the time that French made his application for full-time nursing assistant's work on October 10 up to the date of the hearing herein, Respondent's records reveal that a total of 12 full-time nursing assistants were hired and that after the middle of November 1974, when French expressed his preference for the second,

or 3 to 11, shift, a full-time nursing assistant was hired for that shift. Moreover, Victory's unsupported testimony that there were many applicants highly qualified for the few job openings, does not support a finding that those individuals who were hired after French made his application for full-time work were more qualified to perform the work than was French.

There is little in the record to support a conclusion that Respondent found fault with French's performance to any extent before his open activity on behalf of the Union. And even after that date, there was no testimony in the record to show that any actual work performed by French in attending patients was not fully satisfactory. Accordingly, I find that none of the foregoing reasons assigned by Victory with regard to the qualifications for work as full-time nursing assistants or the number of positions that were open, is dispositive of the issue of whether French was not hired as a full-time employee because of discriminatory reasons.

By reason of the foregoing, what is left to be explored is the Respondent's allegations that French consistently violated the Respondent's employee rules. However, the one rule which French seemed to consistently disregard was the no-solicitation rule which has heretofore been found to have been violative. Accordingly, if the Respondent has relied on French's ignoring of that rule, then Respondent's defense in this respect must fall since it cannot rely upon the violation of an unlawful rule as the reason for not hiring French or any other employee.

I have further discredited Hamilton's testimony to the effect that French lied about the receipt of notification of cancellation of his work assignment for September 20 and 22. Accordingly, I find that there is no credible record support for the Respondent's contention that French has lied.

From all of the foregoing I conclude that while French might not have been in all respects an ideal employee, as witnessed by his participation in the removal of the posting of the revised no-solicitation rule from the bulletin board and, perhaps, by reason of his failing to maintain his person as clean as possible, as testified by Hamilton, on the basis of all of the foregoing the failure of French to receive an assignment as a full-time nursing assistant in accordance with his application on October 10, 1974 was the result of Respondent's disenchantment with him for engaging in activities on behalf of the Union. Accordingly, I find and conclude that French's failure to receive work as a full-time employee on and after October 10, 1974 was by reason of these activities on behalf of the Union and was therefore discriminatory and violative of Section 8(a)(3) and (1) of the Act.

In view of the foregoing finding, I find it necessary to determine whether French's failure to receive more numerous work assignments as a PRN was caused by lack of available work or because French had engaged in union activity.

IV. The Incident of January 30, 1975

Hereinbefore related was the incident in which, on January 30, 1975, French entered the premises of the Respondent to pick up a paycheck and first proceeded to the cafeteria where he commenced a conversation with a fellow employee. At that time, the Respondent's assistant vice president Hampton approached French and asked the latter to leave. When French refused, Hampton called two security guards who then escorted French to the place where French received his paycheck and then escorted him out of the building. It should be noted, that at the time of the incident, French was not on duty.

General Counsel contends that the foregoing incident constituted a violation of Section 8(a)(1) in that it tended to interfere with French's Section 7 rights. On the other hand, the Respondent contends that it had every right to expell French from Respondent's premisse at the time. Respondent cites, in support of its contention, its handbook which provides in part that "Employees are not permitted to receive visitors while on hospital duty." Accordingly, the Respondent argues, when French went to visit with the other employee in the cafeteria he violated the Respondent's rule. Additionally, the Respondent cites the case of *GTE Lenkurt, Inc.*, 204 NLRB 921, in which the Board held that an employer may close his premises to its own employees during their nonworking time except for that which is characterized as "on duty nonworking time." The Board held that a rule of this nature is presumptively valid unless the

union can show that no alternative means of communication is available or that the rule was discriminatorily applied. The Board stated in that case that the status of an off duty employee who returns to vist an employer's facility "is more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees."

In the instant case there is a failure of proof on the part of the General Counsel to show that, in the first instance, French was engaged in any union or concerted protected activity at the time he went into the Hospital and visited his friend in the cafeteria. Secondly, it may be assumed that the rule which the Respondent cites was technically violated although there is no proof in the record on the Respondent's part to show that the employee to whom French was speaking was "on hospital duty." Thirdly, there is no showing by the General Counsel that French was subject to disparate treatment in this respect. There is no evidence that other employees were permitted in the Hospital when not on duty in order to visit with other employees.

In coming to the conclusion, above, taken into consideration are the findings heretofore related with regard to other violations committed by the Respondent. While this series of violations may be considered a precursor to the ejection of French from the cafeteria on Respondent's premises on January 30, and although it may further be considered that this action against French was merely a continuation of the pattern of behavior of the Respondent toward French, I nevertheless conclude that the General Counsel has

failed to prove by a preponderance of the evidence that the Respondent's action at that time was violative.[19] I find that the Respondent properly acted within lawful limitations in ejecting French. Accordingly, I shall order dismissed that portion of the complaint which alleges the Respondent's ejection of French to be violative.

V. The Effect of the Unfair Labor Practices Upon Commerce

The unfair labor practices of the Respondent as set forth in section III, above, occurring in connection with its operations set forth above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

The Remedy

Having found that Respondent has engaged in certain conduct prohibited by Section 8(a)(1) and (3) of the Act, I shall recommend that the Respondend be ordered to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Act.

[19] In arriving at this conclusion, I have considered the fact that Hampton did not testify to deny any of the content of French's testimony with regard to this incident. Nor have I disregarded, in considering all of the facts of this incident, the statement by Hampton, in response to French's question as to whether the cafeteria was open to everyone, to the effect that it was not open to French.

Having also found that Clyde Russell French has been denied work for discriminatory reasons, it shall be recommended that he immediately be offered work and be made whole for any loss of pay or other benefits sustained as the result of the Respondent's failure to assign work to him, computed as provided in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

On the basis of the foregoing findings of fact and upon the entire record I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 150-T, Service Employers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By promulgating and maintaining a no-solicitation rule which prohibits employees from soliciting for the Union during their nonwork time in nonwork public areas of the Hospital, the Respondent has violated Section 8(a)(1) of the Act.
4. By discriminatorily reprimanding employee Clyde Russell French on October 26, 1974, Respendent has violated Section 8(a)(3) and (1) of the Act.
5. By discriminatorily refusing work assignments to employee French, the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

6. By ejecting French from its premises at a time when French was not on duty and not on any break or lunchtime, the Respondent has not violated Section 8(a)(1) of the Act as alleged.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(b) of the act, I hereby issue the following recommended:[20]

ORDER

Respondent, Baptist Hospital, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining in effect, enforcing, or applying any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of its Hospital which is a nonworking area including areas open to the public.

(b) Reprimanding or disciplining any of its employees in any manner for engaging in union or other protected cocerted activities.

---

[20] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Discouraging membership in Local 150-T, Service Employee International Union, AFL-CIO, or any other labor organization, by denying any employee work because said employee engages in union or other protected concerted activity, or discriminating against any employees in any other manner in regard to their hire and tenure of employment or any term or condition of employment for like reason.

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to form, join, or assist, or be represented by Local 150-T, Service Employees International Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activity for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer immediate employment to Clyde Russell French as a full-time nursing assistant or a substantially equivalent position to that to which he would have been employed had he not been discriminated against, without prejudice to any seniority or other rights and privilege he might have acquired, dismissing if necessary any persons hired on or after October 10, 1974, and make French whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set

forth in the section of this Decision entitled "The Remedy."

(b) Forthwith rescind its rule promulgated about October 4, 1974, to the extent that it prohibits its employees from soliciting on behalf of a labor organization during their nonworking time in any nonworking area of the Hospital including those areas open to the public.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Hospital copies of the attached notice marked "Appendix."[21] Copies of said notice on forms provided by the Regional Director for Region 26, of the National Labor Relations Board, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by Respondent for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

[21] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

It is further ordered that the complaint herein be dismissed insofar as it alleges violations of the Act not found.

Dated at Washington, D.C.

/s/ Morton D. Friedman
MORTON D. FRIEDMAN
Administrative Law Judge

FORM NLRB-4727 JD-468-75

(9-69)

[SEAL] NOTICE TO EMPLOYEES [SEAL]
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT promulgate, maintain in effect, enforce or apply any rule or regulation prohibiting you from soliciting on behalf of any labor organization during your nonworking time in any nonworking area of the Hospital including those areas open to the public.

WE HEREBY rescind the rule promulgated October 4, 1974, to the extent that it prohibits you from soliciting on behalf of a labor organization during your nonworking time in any nonworking area of the Hospital, including those areas open to the public.

WE WILL NOT issue reprimands or otherwise discipline you for engaging in union or protected concerted activities.

WE WILL NOT refuse employment to any of our employees because they engage in union or protected concerted activities.

WE WILL offer Clyde Russell French immediate employment as a full-time nurses assistant, or a substantially equivalent position at which position he would have ben employed had he not been discriminated against, without prejudice to his seniority or other rights and privileges he might have acquired,

dismissing, if necessary, any persons hired on or after October 10, 1974.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to form, join, or assist or be represented by LOCAL 150-T, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, or any other labor organization, to bargain collectively through representatives of your own choosing, or engage in other concerted or protected activity for the purpose of collective bargaining or any other mutual aid or protection or to refrain from any or all such activities.

All our employees are free to become or remain or refrain from becoming or remaining members of LOCAL 150-T, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

BAPTIST HOSPITAL, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Clifford Davis Federal Building, Room 746, 167 North Main Street, Memphis, Tennessee 38103, (Tel. No. 901—534-3161).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270375 85